Ombudsmen and Australian universities

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Fifteen years ago, Blizard[4] suggested that universities should establish their own ombudsmen, because the nature of their activities had become so bureaucratic. Some have established internal review mechanisms which fall somewhat short of the idea of a complete ombudsman, but go some way towards achieving the same end. Blizard saw these devices as improving both the lot of the aggrieved or wrong citizen, and the quality of administration.

The establishment of university ombudsmen, or, as in the case of Macquarie University, of on-campus grievance officers as part of the University's Equal Opportunity Plan, goes only part of the way to solving the problems. They may be able to deal with cases of discrimination, sexual harassment, and so on, but they do not always touch other causes of complaint.

In Australia, universities are established by, or under the authority of some statute and thus have a 'public' character which brings them within both the general supervisory jurisdiction of the courts applying administrative law remedies[5] and that of the ombudsman. The powers of the ombudsman complement any internal review mechanisms established by universities. The response of most universities to ombudsman investigation has largely been one of distrust and resentment.

This article explores the role of the ombudsmen in relation to universities, analyses some of the relevant legislation, indicates some problems arising from the limited powers of Ombudsmen, and discusses initiation and investigation of complaints.

While the idea of an external investigative officer may appear to threaten the autonomy of universities, that autonomy is often more apparent than real, and it is argued here that in current conditions the existence of the ombudsman may lead to better universities. However, it may not be enough, and universities need to look to their internal structures and mechanisms in order to improve the achievement of justice and fairness and their own administration.

The office of ombudsman — jurisdiction and powers

Background

The ombudsman is an institution originating in Sweden, which receives complaints from members of the public, investigates them, reports and recommends changes. They have been established in Australia over the last 20 years because it became obvious that people were being affected by maladministration in public bodies and had no remedies. In theory[6] (and it was never more than a theory) members of parliament could call ministers to account for the actions of their departments and agencies. This theory also ignored the growth of the modern bureaucracy and the emergence of a party system.

The courts also provided a check on abuse of administrative power, but their role was limited by a number of factors, including the cost of proceedings, and the complexity of administrative law rules, especially procedural rules and rules governing standing. There was often no way of finding out what action the executive had taken. Even if these obstacles could be overcome, the courts maintained that they could not review the 'merits' of a decision, but merely the procedures by which the decision was reached.

This unsatisfactory situation led many English-speaking countries to review the machinery for challenging administrative decisions. There was a general feeling that 'justice' required that citizens who felt aggrieved by administrative action deserved some avenue of redress.[7] New Zealand established the office of ombudsman in the late 1960s. Other countries soon followed, and when the Commonwealth Ombudsman was established in 1976, there were ombudsmen in all Australian states.

Jurisdiction

Section 5 of the *Ombudsman Act* (1976) (Cth) expresses, in general terms, the function of all Australian ombudsmen:

Functions of Ombudsman

5.(1) Subject to this Act, the Ombudsman —

(a) shall investigate action, being action that relates to a matter of administra-

There can be little doubt that the modern university or other institution of higher education is a bureaucratic structure. Further, there can be little doubt that officers acting on behalf of administrations can and do make errors of judgement — or, stated more cautiously, can stand accused of doing so.[2]

Complaints against universities provide considerable difficulties for the Ombudsman. They invariably seem to provoke allegations of interference with academic freedom and bitterness at the intrusion of an 'outsider' . . . The experience of the New South Wales Ombudsman is that, like all other institutions, including his own, universities are not free from fault . . . Ultimately, it is a matter for the government whether universities should remain within the scrutiny of the Ombudsman. The area is not an easy one. However, while the jurisdiction remains, it is imcumbent on the Ombudsman to investigate complaints against universities which are within jurisdiction and which he believes should be investigated.[3]

Department or by a prescribed authority . . .'

The section provides that the ombudsman may not investigate a range of actions, including action of a minister. He is not expressly precluded from investigating matters relating to universities.

Two phrases require further explanation. "Prescribed authority" is defined in s3 to mean "a body corporate, or an unincorporated body, established for a public purpose by or in accordance with the provisions of, an enactment . . .". All Australian universities are established for a public purpose[8], "by or in accordance with the provisions of . . . an enactment" (also defined in s3, i.e. Commonwealth Acts, Regulations and Ordinances). The Australian National University and the Canberra College of Advanced Education are therefore "prescribed authorities" subject to investigation by the Commonwealth Ombudsman.

The other phrase, "action, being action that relates to a matter of administration", is similar to that of the state legislation discussed below.

In the states, the position is basically the same, though the wording of the legislation varies. In two states[9] the ombudsman is called a "parliamentary commissioner", but the office is essentially similar. In New South Wales (on which this article concentrates) the powers of the ombudsman arise from s13 of the *Ombudsman Act* 1974 which gives the ombudsman power to investigate any matter which may form the subject of a complaint to him. Under s12, any person may complain to the ombudsman "about the conduct of a public authority". "Public authority" is defined in s5 to mean:

(a) any person appointed to an office by the Governor;
(b) any statutory body representing the Crown;
(c) any officer or temporary employee of the Public Service;
(d) any person in the service of the Crown or of any statutory body representing the Crown; [none of the above would appear to apply to universities]
(e) any person in relation to whom or to whose function an account is kept of administration or working expenses, where the account —
(i) is part of the accounts prepared pursuant to the Audit Act, 1902;
(ii) is required under any Act to be audited by the Auditor-General;
(iii) is an account with respect to which the Auditor-General has powers under any law;
(iv) is an account with respect to which the Auditor-General may exercise power under a law relating to the audit of accounts where requested to do so by a Minister of the Crown; . . . [my emphasis]

This provision, more complex than the Commonwealth Act, captures state universities because they are "public" and receive public funds. States other than NSW have legislation which falls somewhere between these extremes of complexity.

In the NSW legislation "conduct" is defined in s5 to mean:

(a) any action or inaction relating to a matter of administration; and
(b) any alleged action or inaction relating to a matter of administration.

Again, the key phrase is "matter of administration" which is not defined in any ombudsman legislation. It has caused problems in the context of the actions of various public bodies and officers, but it is particularly relevant in relation to universities. While a good deal of the activity that goes on in universities may be characterised as "administration", a substantial part of their educational activities cannot. The question of where to draw the line is therefore both legally complex and very important in educational practice.

What an administrator may think of as "administration" may be quite different from what the Courts find to be "administration".[10] Though some Australian courts have considered this in relation to ombudsmen[11], and have also considered the similar phrase "of an administrative character" used in other Commonwealth legislation[12], the best account is found in a recent judgment of the Supreme Court of Canada[13], upholding a judgment of the British Columbia Court of Appeal.[14]. These judgments rejected an argument accepted in Australia by the Full Federal Court[15]. The Canadian Supreme Court concluded that the ombudsman's power of investigation covers all matters which are "managerial" in character. This appears to be the type of activity which Australian parliaments intended ombudsmen to investigate.

If the ombudsman's investigative powers extend to all "managerial" matters, does this affect universities and, if so, how? "Managerial" matters within universities probably include admission of students, appointment and promotion procedures for all staff (both academic and general) and procedures for examination of students, but probably not the actual assessment of students. The ombudsmen's powers therefore probably include the investigation of the merits of particular decisions relating to appointment and promotion, and admission of students, and also of assessment procedures. We shall return to this question after a consideration of the way in which the ombudsmen have approached universities and similar institutions.

The ombudsman is not obliged to investigate every complaint made to him. For example, s13(4) of the *Ombudsman Act* 1974 (NSW) sets out a number of specific grounds on which the ombudsman may decline to investigate a complaint.[16] Subsection (5) requires the ombudsman to consider the public interest when deciding whether or not to discontinue an investigation.[17] If the ombudsman decides not to investigate a complaint, s15 of the NSW Act[18] requires him to inform the complainant of that fact, and of his reasons for the decisions. These provisions ensure that complainants act responsibly, and, more importantly, exhaust any available internal review mechanism before complaining to the ombudsman. They also seek to ensure that the ombudsman carefully considers the matter before declining to investigate. He may be able to decline to investigate simply because he lacks the resources to investigate fully all the complaints he receives.

Powers

While the ombudsman has wide jurisdiction, his powers are limited. He may investigate, but he cannot alter the decision of a public authority. His only power is to make recommendations.

Conduct of investigations

Once the ombudsman decides to conduct an investigation, under both Commonwealth[19] and state[20] legislation, he must inform the senior officer of the authority, the complainant, and any other person who may have an interest, of the investigation and that they may make submissions to the ombudsman. The notice to the authority should identify the nature of the action under investigation. Investigations are conducted in private[21] but the authority must give information or produce documents to the ombudsman. The ombudsman has extensive powers (those of a Royal Commission[22]) to require any person to appear and answer questions and give information, and may conduct formal inquiries.[23] Even if some legal privilege or a statute would prevent the giving of that information in court proceedings, it must be given to the ombudsman. The ombudsman may enter premises to search for documents or other material.[24] Most universities forbid the disclosure of information relating to staff and students, but provisions like s21 of the NSW *Ombudsman Act* or s8(4) of the Commonwealth Act would override such policies or rules.

Before reporting, the ombudsman must allow the authority, and any other person with an interest in the matter, the opportunity to make submissions.

All Australian ombudsmen, after deciding to investigate a complaint, notify the authority or department of the complaint and of the matters raised in it. In larger departments and authorities, a specifically designated liaison officer will discuss the matter with the ombudsman's office at an early stage, possibly that at which the ombudsman decides whether to investigate the complaint. Once a formal investigation starts, the authority will be asked to provide its files to the ombudsman, and the ombudsman's staff will discuss the events surrounding the conduct with the people involved. The ombudsman's staff often visit the authority, rather than requiring the staff of the authority to visit the ombudsman's office.

The ombudsmen must consult the responsible minister if requested to do so but, in the case of universities, it appears unusual for the minister to intervene. This is probably a result of traditional views of university autonomy from ministerial control.

Reports

After the ombudsman has gathered the relevant information, his staff will formulate a tentative draft report which includes his preliminary findings of fact, conclusions, and draft recommendations for action needed to rectify any "wrong" conduct. This will be sent to the authority and to any other person who has made a submission, and they will be asked to comment upon it and to produce any further information which they may consider relevant. After some time for comment, the ombudsman reports. He must report if he finds "wrong" conduct on the part of the authority.[26]

Section 5(2) of the NSW *Ombudsman Act* 1974[27], provides:

(2) For the purpose of this Act, conduct of a public authority is wrong if it is —
(a) contrary to law;
(b) unreasonable, unjust, oppressive or improperly discriminatory;
(b1) in accordance with any law or established practice but the law or practice is, or may be, unreasonable, unjust, oppressive or improperly discriminatory;
(c) based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations;
(d) based wholly or partly on a mistake of law or fact;
(e) conduct for which reasons should be given but are not given; or
(f) otherwise wrong.

This definition includes a number of expressions familiar to administrative lawyers, but which may not make sense to those not as familiar with the law. The definition of "wrong" encompasses many grounds upon which courts traditionally reviewed administrative procedures. However, the criteria in the definition go much further. They allow the ombudsman to make a value-judgment as to the quality of the action or conduct being investigated, as well as a legal judgment.

Paragraph (b1)[28] allows the ombudsman to report upon a matter which is perfectly "legal", but which nevertheless results in injustice, unfairness, etc. While many of the ombudsmen in English-speaking countries have been lawyers, others have not. The ombudsman is not a "court of appeal", nor, indeed, a court of any sort, despite the impression which might be gathered from his powers. The office is, and is intended to be, a part of the administration, though outside the department or agency subject to investigation. While the ombudsman will need legal expertise to determine whether or not action or conduct is "wrong" in the sense used in the legislation, he also needs administrative expertise, for the "wrongness" of the action or conduct will not be ascertainable as a question of law: the judgment must be the sort of judgment that an administrator would make, taking into account not only the lawfulness of the action, but also whether or not it accords with the stated policy of the government or the agency (provided, of course, that the policy is not itself "wrong"), and considerations of efficiency. The ombudsman must also ensure that matters which should have been considered were considered, that matters which should have been ignored were ignored, and that the decision was taken in a fair and reasonable way.

Apart from the special mention of the need to provide reasons for decisions, the criteria for "wrongness" do not specifically mention the procedures which have been followed in relation to the action or conduct, though in practice ombudsmen are very much concerned that proper, consistent and fair procedures have been followed. The maxim that "justice must not only be done but must also be seen to be done" is part of the commonly held conception of what is just, fair, reasonable etc., and the ombudsman reflects this in his comments and reports.

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The ombudsman's report is his ultimate sanction. He must state the reasons for his conclusions[29], and provide it to the authority, the complainant (if the investigation results from a complaint) and to the Minister. It may recommend that

- the matter be reconsidered,
- action be taken to rectify any aspect of the conduct found to be wrong, or that
- any other action be taken.

While the authority or minister may comment on any aspect of the report, if the ombudsman is not satisfied with the authority's response, prepare a special report which is tabled in parliament[30]. The report may be a useful sanction where the authority is a ministerial department, but it is less useful where the authority is independent, as universities are, because the impact of a published report on an independent body is less significant, and if it believes there are convincing reasons for its actions, it may win a public relations victory, despite the ombudsman's findings. In practice, all authorities tend to wish to avoid such publicity.

The publication of an ombudsman's special report, or even the required tabling of an *Annual Report*, is newsworthy and always attracts publicity, especially if it "names names" or mentions a matter of any notoriety.

Ombudsman investigation of universities

The Ombudsman and universities today

Investigation of action by universities is a small part of the ombudsman's workload, but for universities, an investigation by the ombudsman not only consumes time and scarce resources, but also represents a threat to institutional autonomy and an implied criticism of efficient operations — second only to a court action or investigation by the University Visitor. The ombudsmen tend to regard universities just as they would any other statutory body, but members of the university's staff, both academic and administrative, see themselves differently.

Staff of universities are often told (usually by their chancellors and vice-chancellors), and sometimes believe, that they are members of an autonomous institution, a collective, self-governing body of scholars who govern themselves and work for the pursuit of excellence in understanding and knowledge. They believe, in part correctly, that they have "academic freedom", though few of them, if pressed, can give more than a general definition of what this may mean.

Ministers tend to see universities in terms more of the number of students they can accommodate, than in terms of quality of teaching and research. The academic staff are concerned with both the quality and quantity of their research and teaching. In Australia, universities always have had some academic staff representation on their governing bodies, and the academic policies of these institutions tend to be made by bodies consisting entirely of academic staff — formerly professors, but now with increased representation of junior staff and students.

In early Australian universities, administration was carried out by a single official and by the academic staff. The number of students could be measured in hundreds, possibly tens, and the academic staff counted on one hand. This is not possible today, when the smallest university has thousands of students. Universities are complex, bureaucratic organisations[31]. Some sort of hierarchy or bureaucracy appears to be necessary in any complex organisation.

This article began with a platitudinous quotation, followed by a rather legalistic one. Both are quite pertinent in this context. In any complex organisation, mistakes and errors of judgment will be made, and individuals will suffer in consequence. This would be true in any organisation, even the sort of self-governing, autonomous organisation that some contemporary romantics envisage the mediaeval universities to have been.

Naturally, those responsible for policy-making and administration within universities would prefer to be able to correct those errors without external review. Such a situation, if it were possible, would certainly be more efficient and more conducive to a happy working environment. However, without a degree of external scrutiny, it is often difficult for any individual or collection of individuals to realise that errors or misjudgments have been made, even when those affected by such action or conduct are fully aware of the circumstances and have the right and opportunity to complain of their grievances. This is the argument advanced by Blizard[32] in support of an internal university ombudsman, and also by the 1971 *Report* of the Commonwealth Administrative Review Committee, chaired by Sir John Kerr, which laid the foundation for the extensive administrative law reforms of 1975-1982[33]. It is, essentially, that the most efficient administration takes place when those responsible for making the decisions are obliged to provide the reasons that led to the making of the decisions, and to justify and defend those decisions if it is suggested that the decision was wrong. Such a system of review also increases the degree of legitimacy of, and esteem in which, the administration is held, because it becomes known that reasons for decisions are routinely recorded, and will be made available, and that review by some external instrumentality is possible. This system may not be designed to encourage entrepreneurial innovation, but is this expected of administration? The qualities most desirable, both in state and in educational administration, are fairness, consistency, and efficiency in use of available resources.

All Australian universities are funded from the consolidated revenue of the Commonwealth. To some extent, the Commonwealth Tertiary Education Commission and its councils ensure that Commonwealth funds are accounted for in the technical sense; extravagances and inefficiency are punished by a reduced grant for the institution in the next funding period. However, in today's political environment this is not really sufficient to satisfy community demands for accountability. In NSW, universities are subject to investigation by the ombudsman primarily because their accounts are subject to the scrutiny of the Auditor-General.[34] This recognises both the public nature of universities (signified not only in their sources of income but also by the fact that they are open to any student who meets the academic requirements for admission) and their statutory origins.

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This account of the relation of the ombudsman to universities in Australia emphasises their public nature. While academic staff are paid from public funds in this way, it seems unduly idealistic or romantic to assert, as some do, that the academy should revert to the idealised mediaeval conception of a community of scholars. Academic freedom, like most of the freedoms which we value, is not absolute, and is to some extent dependent upon the institutional context in which academics operate. There is a clear threat to academic freedom from the growing state.[35] University staff must be vigilant to ensure that they are free to carry out whatever research they choose in whatever manner they choose, and that, within the area in which they are assigned to teach, they may choose their own methods of teaching and assessment. The concept of an autonomous community of scholars may have been appropriate in days when academics depended on the lecture fees paid by their students for their livelihood; it may, conceivably, be appropriate to some North American institutions which also depend entirely on student fees and endowments, rather than public funds.

Academic staff have no real cause for resenting the possibility of investigation by the ombudsman, provided that the ombudsman does not interfere with the professional judgments they may make in the course of the performance of their academic duties which are not "administrative" in character, but which really do depend on their academic and professional skills as teachers and researchers, such as the assessment of students' work. Academic staff may be reassured by the comments made by the South Australian Ombudsman: "Obviously, I'm not in a position where I can re-mark a paper and give my own assessment of it . . . course content is not my business"[36], but, as will become apparent, the Ombudsman is not always so reluctant to become involved with questions of assessment of students. While the position of academics is rather hazy, educational administrators have no greater grounds for resisting the investigation of their activities by the Ombudsman than do public servants in general.

What will the ombudsman investigate?

Many complaints to the ombudsmen about universities are similar to those about other public bodies, e.g. transfer of staff, long-service leave and superannuation benefits, refunds of fees if a student withdraws from a course, and similar matters. Most complaints are resolved amicably. The *Annual Reports* of the ombudsmen suggest that often the institutions will revise their procedures, regulations or guidelines after the ombudsman's investigation. Once the subject of the complaint has been brought to the attention of the institution, it is often resolved without further external review. External scrutiny does add to the urgency, and the attention to detail with which matters are considered. One colourful example of this occurred in Western Australia. The relatives of a person whose body had been left to a university for medical research complained that, as the university no longer required it, the university, and not the complainants should pay burial expenses, as they could not afford these. As a consequence, procedures were changed to allow the university to make a payment to the deceased's family.[37]. The University of Queensland varied its procedures for appointment of academic staff to waive the requirement of a chest X-ray following a complaint by an appointee who objected to the procedure. The ombudsman found that the X-ray was only one of several alternatives which the university could use to satisfy itself of the health of appointees.[38] The South Australian ombudsman investigated a complaint by a potential supplier of computer equipment to a university who alleged that the university's tendering procedures were unreasonable and were not properly carried out. This complaint was found to be unjustified.[39]

More controversial are complaints dealing with the promotion and appointment of academic staff, assessment of students, and admission to courses of study.

Each such matter involves not only aspects of administrative conduct, but also the exercise of professional judgment. Of course, many other classes of administrative behaviour also involve professional expertise, but not in quite the same way.

Promotion and appointment decisions are made in all large organisations. In general, the ombudsman has no jurisdiction to entertain complaints about such matters in the public service. Normally the ombudsman declines to investigate complaints about appointment and promotion in universities, provided there is no allegation that the decisions are conducted unfairly, without regard to irrelevant considerations, or without disregarding relevant considerations. For example, the Queensland Ombudsman received a complaint about procedures leading to appointment of associate professors in a university. The complainant alleged that his past criticism of such procedures had counted against his own application, and that in the course of the procedures defamatory statements had been made against him. The ombudsman examined the university's files and records, and discussed the matter with members of the relevant committee. He found that as the application had been considered properly and fairly, and there was no wrong conduct, the complaint was not justified.[40] The Queensland Ombudsman also investigated a complaint about procedures for appeals and promotions, and after finding that there was no wrong conduct, he reported:

> *My opinion is that where a body or group of persons is charged with the responsibility of appointing an applicant to a vacant position, my enquiries should have the primary objective of ascertaining whether the body or group has properly exercised its discretion. Intervention is only justified if the discretion has not been properly exercised and, perhaps, if the decision reached is manifestly wrong.*[41]

The other ombudsmen seem, quite correctly, to take a similar view. In describing his approach to matters which are "administrative", but which also involve an element of professional judgment or discretion, the Commonwealth Ombudsman has written:

> *Traditionally Ombudsmen have tended to regard the activities of professionals within the administration as not involving administrative functions. This tendency has been particularly noticeable in respect of medical practitioners and I have myself sometimes made distinctions between administrative and medical aspects of a complaint. Nevertheless the Ombudsman Act empowers me to investigate 'action that relates to a matter of administration' and I do not regard the actions of a doctor in treating a patient on behalf of the Repatriation Commission as outside the scope of this phrase, any more than, for example, are those of a public service lawyer in providing legal opinions, a government social worker in counselling welfare recipients or an economist in providing advice to a Minister about the effects of budget decisions. That does not mean, however, that I will seek to second-guess every judgment made by a professional in the course of his public service duties. Nearly all the administrative actions called into question as a result of complaints to my office involve the exercise of judgment and, provided such exercise does not involve the infringement of the Ombudsman Act criteria of reasonableness, justice, etc., I will not seek to interfere. With the more esoteric disciplines, of course, legitimate judgmental factors arising from the professional experience and training of the individual will weigh more heavily than they do in the case of more normal administrative activity and the scope for Ombudsman enquiry is accordingly reduced.*[42]

"Provided that the ombudsmen exercise the type of restraint advocated by the Queensland and South Australian Ombudsmen, academic staff have little to fear from them."

An academic is, it is suggested, a "professional" in the sense that as a teacher and a person with a substantive command of a particular discipline, he or she is expected to make judgments on the basis of his or her expertise, in relation to students, but also in relation to the appointment and promotion of academic staff. To the extent that the ombudsman has jurisdiction over universities, academic and other staff must expect that their judgments will be reviewable. Decisions relating to appointment and promotion are "action" or "conduct" in relation to administration, albeit the administration of a university. Provided that the ombudsmen exercise the type of restraint advocated by the Queensland and South Australian Ombudsmen, academic staff have little to fear from them. It may be that they trade off what might he regarded as "academic freedom" in this area for the assurance that a person outside the institution will be available to investigate decisions relating to appointment and promotion if it is alleged that they are "wrong" in the sense in which it is used in the NSW *Ombudsman Act*.

More difficult is the question of procedures for assessment of students, both at undergraduate and postgraduate level. Here, the professional judgment of the academic is in question and the effects of a decision are likely to be significant; the student's career may be at stake. The attitude of the South Australian Ombudsman has already been quoted[43]; he was not prepared to undertake assessment himself, nor was he concerned with course content. There may be cases where the intervention of the ombudsman may be warranted.

Reporting a complaint by a student about the assessment of a research component required for the award of an honours degree in Law at Macquarie University, the NSW Ombudsman rejected arguments of some staff that questions of assessment were beyond the ombudsman's jurisdiction because they did not relate "to a matter of administration". He relied on a judgment of the Federal Court[44] in a case where a student who had completed (but failed) some examinations conducted by a Board of Examiners appointed under the *Patent Attorneys Regulations* sought a review by the Court of his results under the *Administrative Decisions (Judicial Review) Act* 1977, (Cth). That Act applies to "decisions of an administrative character" and Fox ACJ found that the decision of the Board had that character. The examinations were part of a procedure established by law to ensure that aspiring patent attorneys had sufficient knowledge and which was found to be "administrative". The NSW Ombudsman said:

> *His Honour's reasoning suggested that the process by which a university determines the examination results and ultimately the academic performance and standing of students is of an administrative character. Further, senior counsel has advised . . . that a complaint that the process by which the examination performance of a student was affected by bias or improper motivation would relate to a matter of administration and be capable of investigation under the Ombudsman Act. Clearly, on the other hand no Ombudsman would wish as a matter of discretion to be involved in the process of investigating complaints which merely reflect a dissatisfaction on the part of a student about the marks awarded to him or her. Accordingly, generally speaking complaints about marks are not investigated unless there is something more alleged, such as bias or a failure to observe fair or prescribed procedures.*[45]

The Commonwealth Ombudsman has taken a similar view:

> *To date most of these have queried the system whereby marks or grades are determined in secondary or tertiary institutions, though some raised such issues as discipline, and, in the postgraduate field, the selection process and the calibre and amount of supervision.*

Several of these complaints raised the sensitive question of the exercise of professional "academic" judgments and most challenged, at least by implication, the autonomy in these matters which educational institutions have tended to regard as sacrosanct. For my part I do not accept that because an action involves the exercise of professional judgment of one sort or another it ceases to be an action that relates to a matter of administration and I will make any enquiry that is necessary in order to investigate properly . . . I do not see it as part of my functions to substitute my own opinion for the expertise of individual decision-makers provided their decisions accord with accepted standards. [my emphasis][46]

Ombudsmen regard assessment as part of an administrative process and therefore subject to their investigation. However, they will not investigate complaints which appear to relate only to the assessment of a student, nor to substitute their judgment for that of the academic concerned, unless the investigation establishes the likelihood of bias, or that prescribed procedures were not followed.

Evans v Friemann concerned not a university, but a specific statutory process with a specific purpose. The system of examinations established to assess potential patent attorneys is rather different from the sort of assessment schemes found in most modern Australian universities which, one assumes, seek to assess more than professional competence. Assessment and examination procedures of universities have a statutory basis, but it is rather different from that of the *Patent Attorneys Regulations*. Even so, it is extremely difficult to argue with the ombudsmen's statutory interpretation in relation to their jurisdiction to investigate the *process* of assessment, as opposed to the individual professional judgments that are made.

A final area of possible controversy is the admission of students to both postgraduate and undergraduate courses, where, too, much depends upon professional judgment. Admission to undergraduate courses appears not to be problematic, because the large number of applicants for places means that there are fairly clear and publicly-known procedures and criteria for determining entry. Nevertheless, clerical and other administrative errors do take place, as the Queensland Ombudsman reported in 1977. An applicant for a place in a course, whose admission criteria were known, did not receive an offer. The ombudsman's investigation revealed that the admission procedure was more complex than the applicant believed: a number of different agencies were involved, and the investigation revealed that the complainant had been the victim of not one, but two administrative errors. As a result of the investigation, the applicant was offered a place in the course of his first choice.[47]

The discussion of admissions in the ombudsmen's reports suggests that the systems operated by universities work well, and that errors are usually corrected when pointed out. For example, the South Australian Ombudsman received a complaint from an applicant for a place in a course in medicine, who had a second-class honours degree in Science, and did not accept the university's decision that this was not sufficient to gain entry to the course. The ombudsman found that the decision was proper and the complainant was satisfied with the result of the investigation.[48]

Admission to postgraduate courses, and the degree of supervision provided by universities have also been the subject of complaints, but these generally are not accorded great importance by the ombudsman.[49]

Conclusions

The ombudsmen's relation to Australian universities flows from the public nature of universities. It may not sit easily with traditional notions of academic freedom and institutional autonomy. It is difficult to meet the argument that while Australian universities are so overwhelmingly funded from public revenue, the managers of that public revenue are entitled to demand a degree of accountability which extends beyond a mere accounting procedure. Most impartial observers — even university registrars — admit that their institutions are complex organisations, and administrative error is possible, even thongh conscientions managers will strive to minimize errors. The presence of an external review mechanism, such as that provided by the ombudsman, may be an incentive to administrative and other staff to ensure that their decisions are made properly, and that the procedures they follow are themselves fair and reasonable. Where institutions have established internal review machinery, there may be less demand for investigation by the ombudsman.

While tbey are publicly funded, universities cannot legitimately claim total autonomy, though there are clear reasons why, in order to perform their functions of the transmission, reproduction and development of culture and understanding, they should be as free from outside control as possible. Freedom from control in this sense includes autonomy in the development of academic policies and the conduct of teaching and research. It may not extend to the freedom to determine whether or not their policies and

"The real area of concern for academics should be the wide view which some ombudsmen appear to take of their power to investigate assessment of students."

procedures are fair or applied fairly. While academics and other university staff would do well to heed the warnings such as that given by the Vice-Chancellor of Sydney University about the potential dangers to the cultural tradition posed by increasing state control over higher education[50], investigation by the ombudsman is not the sort of state control which holds dangers for universities. It is of a different order, confined to matters of "administrative" character (even though one might disagree with the wide meaning which the ombudsmen seem to have given to this expression), and cannot lead to actual changes in decisions, merely to the making of judgments whether or not administrative action is wrong, and if so, to recommendations designed to correct the wrong. If an institution is sufficiently convinced that its action is right, notwithstanding the ombudsman's contrary view, it is entitled to maintain its position.

The real area of concern for academics should be the wide view which some ombudsmen appear to take of their power to investigate assessment of students. Is there any sound reason why the ombudsman should not investigate complaints which allege that proper procedures have not been followed, that relevant considerations have not been taken into account, that irrelevant considerations have been taken into acconnt or that the staff assessing the student's work is or are biased? Such conduct, unfortunately, is not unknown. Academic staff, like administrative staff, are fallible, and should not object to procedures designed to point out the errors they may have made and to give them an opportunity to rectify those errors. They need to know that students are entitled to be treated fairly and on proper grounds. Students also need to know this. Provided that, as the ombudsmen appear to concede, the academic or professional judgment made about the work is that of the academic, there is nothing to fear from a process which should ensure that the judgment is made on a basis which is proper and reasonable. The NSW Ombudsman, in a report on my own School, has quite correctly pointed out (without finding this to be so in the particular complaint under investigation) that students may become involved in or affected by factional or personal differences between staff.[51]

Other ombudsmen regularly report complaints of bias by teachers at various levels, few of which have been found to be justified, but which still need to be investigated. The possibility of ombudsman investigation is a wonderful spur to ensure that academic procedures are as fair and reasonable, in both structure and application, as is humanly possible. While ombudsmen say that they are "not prepared to investigate academic quality"[52], their wide view of the scope of "administrative" procedures of the assessment process should cause some concern. How far short of actually reassessing students' work will the ombudsman stop?

With this reservation, it is suggested that ombudsmen play a valuable role in administration, and that this role is equally valuable in university administration. They increase public confidence in the administration, because their presence ensures that those responsible will take care to ensure that their conduct is not "contrary to law . . . unreasonable, unjust, oppressive or improperly discriminatory". This cannot be seen as an unwarranted intrusion on academic freedom.

1. This article is based on a paper delivered at a Continuing Education Program Seminar offered by the School of Law, Macquarie University, in June 1986. The assistance of Alec Christie in research is acknowledged.
2. Peter Blizard, "Administrative Change in Universities: the Case for an Ombudsman" in *Vestes*, 14, p.208 and p.211.
3. N.S.W. Ombudsman, *Annual Report*, 1983-1984, p.21.
4. n 2 above.
5. Discussed in J. Goldring and A. Christie, "The Legal Status of Higher Education in Australia" in J. Goldring, (ed.), *Higher Education and Administrative Law*, Macquarie University School of Law, North Ryde, 1986.
6. Articulated in the work of A.V. Dicey, especially *Introduction to the Study of the Law of the Constitution*, (10th ed.), by E.C.S. Wade, Macmillan, *London*, 1961.
7. Some of this background material is discussed in J. Goldring, "The Foundations of the 'New Administrative Law' in Australia" in *Australian Journal of Public Administration*, 40, 1981, p.79.
8. See J. Goldring and A. Christie, above, n 5.
9. Queensland and Western Australia.
10. This question is canvassed fully in N. Hennessy and J. Goldring, "Administrative Character" (1985) 59 *Australian Law Journal* 659. That article was published before the decision of the Supreme Court of Canada in *Re British Columbia Development Corporation and Friedmann* (n 13 below) became available.
11. e.g. *Glenister v Dillon* [1976] VR 550; *Booth v Dillon (No 2)* [1976] VR 434; *Booth v Dillon (No 3)* [1976] VR 143.
12. Most of this is referred to in the article by Hennessy & Goldring, op cit, n 8.
13. In *Re British Columbia Development Corporation and Friedmann* (1985) 14 DLR (4th) 129.
14. [1982] 5 WWR 563, esp at p.570.
15. Especially by Fox A.C.J. in *Evans v Friemann* (1982) 53 FLR 229.
16. It reads:

    Where any person has complained to the Ombudsman under section 12 about the conduct of a public authority, the Ombudsman, in deciding whether to make that conduct the subject of an investigation under this act or whether to discontinue an investigation commenced by him under this Act —

    (a) may have regard to such matters as he thinks fit; and
    (b) without limiting paragraph (a), may have regard to whether, in his opinion —
    (i) the complaint is frivolous, vexatious or not in good faith;
    (ii) the subject-matter of the complaint is trivial;
    (iii) the subject-matter of the complaint relates to the discharge by a public authority of a function which is substantially a trading or commercial function;
    (iv) the conduct complained of occurred at too remote a time to justify investigation;
    (v) in relation to the conduct complained of there is or was available to the complainant an alternative and satisfactory means of redress; or
    (vi) the complainant has no interest or insufficient interest in the conduct complained of.
17. There are similar provisions, e.g. s 6 of the *Ombudsman Act* 1976 (Cth), in the other ombudsman legislation.
18. Section 12 of the Commonwealth Act, and provisions of other State legislation are similar.
19. s 8(1).
20. e.g. NSW s 16.
21. s 8(2) (Cth); s 17 (NSW).
22. s 9 (Cth); s 19(2) (NSW).
23. s 14 (Cth); s 29 (NSW).
24. s 14 (Cth); s 20 (NSW).
25. s 8 (Cth); s 24 (NSW).
26. s 15 (Cth); s 26 (NSW).
27. Which is in almost identical terms to s 15(1) of the Commonwealth Act and similar provisions in the legislation of each of the other States.
28. s 15(1)(a)(iii) of the Commonwealth Act is very similar.
29. s 15(4) (Cth); S 26(1) NSW.
30. In NSW, this report is made, under s 27, to the Minister, specifically for presentation to Parliament. The scheme of the Acts in the other States is basically similar. The Commonwealth Ombudsman may first make a special report under s 16 of his Act to the Prime Minister, but if this does not result in a response which the Ombudsman considers satisfactory, he may make a special report to parliament under s 17. Normally a report to the Minister will be enough, and the Prime Minister has indicated to the Commonwealth Ombudsman that he will normally act in accordance with the Ombudsman's recommendations, but a report to Parliament becomes a public document and is available to the media.
31. See Blizard, op. cit., n 2; also C.A. Hughes "Bureaucracy in Universities" in *Australian University*, 11, 1973, p.36.
32. op cit, n 2.
33. Discussed in J. Goldring, "The Foundations of the 'New Administrative Law' in Australia in *Australian Journal of Public Administration*, 40, 1981, p.79.
34. See text at n 7 above, especially para (e) of the definition of "public authority" in s 5 of the *Ombudsman Act* 1974 (NSW).
35. Lord Chorley, "Academic Freedom in the United Kingdom" in *Law and Contemporary Problems*, 28, 1963, p.647.
36. *Annual Report*, 1981-1982, p.9.
37. W.A., Parliamentary Commissioner for Administration, *Annual Report*, 1973-1974, p.57ff.
38. Queensland, Parlianentary Commissioner for Administration, *Annual Report*, 1980-1981, p.53.
39. S.A., Ombudsman, *Annual Report* 1981-1982, pp.39-40.
40. Queensland, Parliamentary Commissioner for Administration, *Annual Report*, 1976-1977, p.46; see also W.A., Parliamentary Commissioner for Administration, *Annual Report*, 1973-1974, p.57.
41. Queensland, Parliamentary Commissioner for Administration, *Annual Report* 1974-1975, p.20.
42. Commonwealth Ombudsman, *Fifth Annual Report* 1982-1983, p.59.
43. See n 36 above.
44. Fox A.C.J. of the Federal Court in *Evans v Friemann* (1981) 53 F.L.R. 229.
45. N.S.W. Ombudsman, *Annual Report*, 1983-1984, 21. cf the remarks of the South Australian Ombudsman quoted at n 36 above.
46. Commonwealth Ombudsman, *Seventh Annual Report*, 1984-1985, p.107.
47. Queensland, Parliamentary Commissioner for Administration, *Annual Report*, 1976-1977, p.46.
48. S.A. Ombudsman, *Annual Report* 1973-1974, p.119.
49. Commonwealth Ombudsman, *Seventh Annual Report* 1983-1984, p.107.
50. J.M. Ward "Accountability and Responsibility: The University Challenges of the 1980s", in *Australian Journal of Public Administration*, 44, 1985, p.73.
51. N.S.W. Ombudsman, *Annual Report*, 1983-1984, pp.21-22.
52. N.S.W. Ombudsman, *Annual Report*, 1975-1976, p.46.

References